IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 15-14642

JAMES ERIC MCDONOUGH,

Plaintiff-Appellant,

v.

KATHERINE FERNANDEZ-RUNDLE,
in her official capacity as State Attorney,
Eleventh Judicial Circuit, State of Florida,

Defendant-Appellee.

AMICUS CURIAE BRIEF OF CITY OF HOMESTEAD IN SUPPORT OF APPELLEE, KATHERINE FERNANDEZ-RUNDLE'S PETITION FOR REHEARING AND REHEARING EN BANC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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MCDONOUGH V. FERNANDEZ-RUNDLE,

CASE NO. 15-14642

CERTIFICATE OF INTERESTED PERSONS

AND

CORPORATE DISCLOSURE STATEMENT

The amicus curiae, City of Homestead, Florida, submits this list, which includes the trial judge, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this review:

1. Agarwal, Amit, Solicitor General
2. Altonaga, Cecilia M., U.S. District Judge, Southern District of Florida
3. City of Homestead, Florida, amicus curiae
4. Eaton, Carrol Cherry, Senior Assistant Attorney General
5. Eggers, Melissa, Assistant Attorney General
6. Fahlbusch, Charles M., former Special Counsel Assistant Attorney General
7. Fernandez–Rundle, Katherine, Defendant–Appellee
8. Florida Department of Financial Services
9. Funes, Freddy, court-appointed amicus curiae
10. Gelber, Schachter & Greenberg, P.A.
11. Glantz, David J., former Senior Assistant Attorney General
12. Greenstein, Alan, former attorney for Plaintiff–Appellant

MCDONOUGH V. FERNANDEZ-RUNDLE

Case No. 15-14642

CERTIFICATE OF INTERESTED PERSONS

AND

CORPORATE DISCLOSURE STATEMENT
(Continued)

13. Guedes, Edward George, Counsel for City of Homestead
14. McDonough, James Eric, Plaintiff–Appellant
15. O'Sullivan, John, U.S. Magistrate Judge, Southern District of Florida
16. Pratt, Jordan E., Deputy Solicitor General
17. Rolle, Alexander E., Chief of the Homestead Police Department

/s/ *Edward G. Guedes*
Edward G. Guedes

CERTIFICATION OF COUNSEL FOR EN BANC DETERMINATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedent of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Migut v. Flynn*, 431 Fed.Appx. 262 (11th Cir. 2005).

/s/ *Edward G. Guedes*
Attorney of record for
City of Homestead,
Amicus Curiae

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CONCISE STATEMENT OF THE AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORIZATION TO FILE.

The amicus curiae, the City of Homestead ("City"), is a Florida municipality whose police chief is at heart of the issues on appeal. The City has a vested interest is defending the privacy expectations of its police chief, particularly when the chief's conduct involved internal affairs matters discussed in his private office. The City also has a substantial interest in not having Florida's public records law and Government in the Sunshine Law extended beyond its well-established parameters to reach the conduct attributed to its police chief.

The filing of this brief has been authorized by the City's chief executive officer, City Manager George Gretsas.

CITY'S RULE 29(A)(4)(E) STATEMENT

The City's undersigned counsel authored this brief in its entirety. No counsel for either party contributed in any way to the drafting of this brief. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. Finally, no person—other than the amicus curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF ISSUE MERITING EN BANC DETERMINATION

Whether a police chief enjoys an expectation of privacy, such that an unauthorized recording of his communications during a meeting occurring in his private office and involving participants present solely by invitation, would constitute a violation of section 934.03, Florida Statutes.

STATEMENT OF FACTS

The City adopts the State Attorney's statement of the case and facts.

SUMMARY OF ARGUMENT

Rehearing is warranted because the majority opinion misapprehends the privacy expectations arising from a meeting in the private office of Police Chief Alexander E. Rolle, Jr. The majority's reliance on Florida's public records and "Government in the Sunshine" laws was misplaced; neither law applies to the meeting that took place. Indeed, police internal affairs investigations are exempt from public records requirements until their conclusion.

Chief Rolle's failure to invoke confidentiality or to react when James McDonough placed his phone in plain view is insufficient to defeat the chief's expectation that his conversation would not be recorded. Florida precedents safeguard the chief's expectations under circumstances more public than those presented here.

Rehearing en banc should be granted because the decision conflicts with this Court's decision in *Migut.*

ARGUMENT

I. FLORIDA'S PUBLIC RECORDS AND SUNSHINE LAWS DO NOT APPLY.

A. Florida's public records law does not govern meetings.

Florida's public records law—section 119.07, Florida Statutes—governs the public's right to inspect *documents* or other *forms of memorialized* communications deemed to be public records. Fla. Stat. § 119.07(1)(a). A "public record" is defined as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material…made or received…in connection with the transaction of official business by any agency." Fla. Stat. § 119.011(12). A conversation/meeting is *not* a public record.

To the extent the majority believed that policy concerns underlying access to public records defeated Chief Rolle's privacy expectations, such a belief is unwarranted here. McDonough "lodged a series of complaints" against a City officer, and was invited to Chief Rolle's office "to discuss the complaints." Op. at 2; *see also id.* at 3 ("McDonough filed a complaint…with the Internal Affairs Department[.]"). McDonough filed another complaint against Murguido in 2014, and another one *during* the meeting with Chief Rolle. *Id.* at 4, 5. Indeed, Detective Aquino from Internal Affairs was present for the meeting. *Id.* at 4.

Section 112.533, Florida Statutes governs the receipt and processing of complaints against an officer: "*A complaint filed against a law enforcement officer*…with a law enforcement agency…and *all information obtained pursuant to*

the investigation by the agency of the complaint ***is confidential*** *and* ***exempt*** *from the provisions of s. 119.07(1)*" until the investigation ceases to be active or the agency gives notice of its conclusion. Fla. Stat. § 112.533(2)(a) (emphasis added).

Therefore, contrary to the opinion's assumptions, complaints *and* all information obtained pursuant to an investigation thereof are deemed "confidential" and not subject to public disclosure until the investigation is completed. Florida's public records law not only fails to defeat Chief Rolle's privacy expectations, it actually reinforces them.

B. Florida's sunshine law does not apply to meetings of City employees with members of the public.

Florida's sunshine law, section 286.011, Florida Statutes, states, in pertinent part: "All meetings of *any board or commission* of any…municipal corporation, or political subdivision,…*at which official acts are to be taken* are declared to be *public meetings open to the public at all times*[.]" Fla. Stat. § 286.011(1) (emphasis added). Meetings conducted by individual municipal employees, though, are not public meetings under section 286.11. *See, e.g., Florida Parole and Probation Comm'n v. Thomas*, 364 So. 2d 480, 481 (Fla. Dist. Ct. App. 1978). "The obvious intent of the…Sunshine Law…was to cover any gathering of some of the members of a public board where those members discuss some matters on which foreseeable action may be taken by the board." *Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. Dist. Ct. App. 1973) (citing *Canney v. Bd. of Pub. Instruction of Alachua Cnty.*, 278 So. 2d 260 (Fla. 1973)).

The *Thomas* court held, "*It is well settled that frequent, unpublicized meetings between an agency member and advisors, consultants or staff who assist him in the discharge of his duties are not meetings within the contemplation of the Sunshine Law*." *Id.* at 482 (emphasis added). The *Thomas* court is not alone in this conclusion. *See, e.g., Sarasota Citizens for Resp. Gov't v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010) (administrator's meetings with staff and public regarding a memorandum of understanding and individual meetings with county commissioners were not subject to section 286.011); *McDougal v. Culver*, 3 So. 3d 391, 392-93 (Fla. Dist. Ct. App. 2009) ("[M]eetings between an executive officer and his consultants, advisors, staff or personnel, which are held for the purpose of fact-finding to help him in the execution of his duties are not meetings as contemplated by the Sunshine Law."); *Godheim v. City of Tampa*, 426 So. 2d 1084, 1088 (Fla. Dist. Ct. App. 1983) (rejecting sunshine law challenge to private "negotiation meetings conducted by city staff members with the two competing vendors," even though the mayor exercised supervision over negotiating team).

Nothing about Florida's sunshine law defeats a police chief's privacy expectations in a meeting with members of the public and an internal affairs detective in the chief's office. As such, the majority's conclusion that the meeting here constituted a "public meeting" under the exemption in section 934.02, Florida Statutes, is unwarranted. Section 934.02 does not define "public meeting," so the term should be construed in accordance with the law governing the conduct of public meetings. *See* Fla. Stat. § 286.011 ("All meetings of any board or

commission…at which official acts are to be taken are declared to be public meetings[.]"). As the foregoing analysis demonstrates, Chief Rolle's meeting with McDonough—even if it included an internal affairs detective and an acquaintance of McDonough's—does not constitute a "public meeting" under section 286.011.

In *Pinellas County School Bd. v. Suncam, Inc.*, 829 So. 2d 989 (Fla. Dist. Ct. App. 2002), the court considered the meaning of "public meeting" when considering whether the sunshine law permitted an individual to videotape a school board public meeting. *Id.* at 990. To bolster its conclusion that recording was permitted, the court relied upon the "public meeting" exemption in section 934.02(2):

> [T]he Legislature in s. 934.02(1), F.S., appears to implicitly recognize the public's right to silently record *public meetings*. Chapter 934, F.S.,…regulates the interception of oral communication. Section 934.02(2), Florida Statutes, however, defines "oral communication" as specifically excluding "public oral communication uttered at a *public meeting*."

Id. at 991 (emphasis added).

In *Department of Agric. and Consumer Servs. v. Edwards*, 654 So. 2d 628 (Fla. Dist. Ct. App. 1995), the First District rejected the "public meeting" concept espoused by the majority here. While the court concluded there was no privacy expectation as to statements made by a superior officer when *disciplining a subordinate officer*, *id.* at 632-33, the court refuted that its holding was premised on the meeting being a "public meeting."[1] *Id.* at 633 ("[A]ny part of that finding

[1] The *Edwards* court's conclusion as to lack of privacy is readily understood (continued . . .)

premised on a belief that the disciplinary interview could be considered 'an extension of a public meeting,' is invalid.").

II. CHIEF ROLLE'S FAILURE TO INVOKE CONFIDENTIALITY DURING THE MEETING OR HIS FAILURE TO REACT TO MCDONOUGH'S PLACEMENT OF HIS PHONE IN OPEN SIGHT IS INSUFFICIENT TO REMOVE THE MEETING FROM THE REACH OF SECTION 934.03.

The City acknowledges the two-prong test in *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1972) to determine whether a conversation is protected by section 934.03. However, the City notes that the definition of "oral communications" in section 934.02(2) does ***not*** concern itself with expectations of "confidentiality"—as the majority seems to conclude, Op. at 4, 9—but rather with expectations of whether a "communication will be subject to *interception*." Fla. Stat. § 934.02(2) (emphasis added). "Interception" is concerned with the "acquisition of the contents of any…oral communication through the use of any electronic, mechanical, or other device." Fla. Stat. § 934.02(3). Consequently, the correct inquiry on appeal is not whether Chief Rolle had a reasonable expectation of "confidentiality," but rather whether he had a reasonable expectation that his conversation would not be surreptitiously recorded.

The opinion nonetheless concludes that because Chief Rolle did not "express" himself to safeguard his expectations of privacy, he was not entitled to

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(. . . continued)
in light of the substantial restrictions imposed on any officer disciplinary investigation under sections 112.532-.533, Florida Statutes.

any. Op. at 9. This is contrary to *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977), where the court explained the legislative policy underlying section 934.03: "This was a policy decision by the Florida legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to the conversation." *Id.* at 726-77. Stated differently, the legislation's premise is that individuals *inherently* have an expectation of not being recorded. The right is not dependent on the individual affirmatively invoking it. *See also Edwards*, 654 So. 2d at 632 (noting that "the focus of the [Florida Supreme Court's] decision[s] was the *absence of consent* to the recording").

Chief Rolle could have held the meeting with McDonough in a more public location or even at McDonough's home or office, but did not. Instead, Chief Rolle invited McDonough to a location where the public is not normally allowed. Florida courts have declined to recognize the expectation of privacy in a private office only when society is unwilling to recognize the privacy expectation as reasonable. Thus, the *Inciarrano* court declined to find an expectation of privacy where the utterer *went to the office of the individual who recorded the conversation and murdered him*. 473 So. 2d at 1274. The court assumed a subjective expectation of privacy, but concluded that "such expectation, under the circumstances, was not justified. … Inciarrano went to the victim's office with the intent to do him harm." *Id.* at 1275

In *Jatar v. Lamaletto*, 758 So. 2d 1167 (Fla. Dist. Ct. App. 2000), the uttering individual "undoubtedly had a subjective expectation of privacy," but

because he "did not visit [the] office in the ordinary course of business," but rather to do the other person harm, society was "not prepared to recognize as reasonable an expectation of privacy in such activity." *Id.* at 1169.

In *Morningstar v. State*, 428 So. 2d 220 (Fla. 1982), the person recorded was a pawnbroker who accepted jewelry from a known burglar. *Id.* at 221. The police, cooperating with the burglar, recorded the pawnbroker's conversations without his consent. Over objection, the recordings were admitted under section 934.03(2)(c). *Id.*

The court noted, "Although Morningstar may have maintained a reasonable expectation of privacy in his private office, that expectation under these circumstances is not one which society is willing to recognize as reasonable or which society is willing to protect." *Id.* at 221. Here, too, the court was willing to recognize an expectation of privacy in one's private office provided the second part of the *Inciarrano* test was established.[2] Here, there is no indication that Chief Rolle invited McDonough to his office for any kind of improper purpose.

The majority misapprehended *Edwards* when it observed the presence of "several people" at the meeting "rendered any subjective expectation of privacy unreasonable." Op. at 10. The number of people was not determinative in *Edwards*, because the court highlighted the unique setting of police disciplinary

[2] The City respectfully disagrees with the majority's characterization of *Inciarrano* as having determined that offices are "quasi-public" places. Op. at 12. *Inciarrano* makes reference to an office being "quasi-public" only when recounting the *trial court's* conclusions, 473 So. 2d at 1274, but does not show that the Supreme Court endorsed the trial court's conclusion.

proceedings, indicating it was obligated to defer to the Public Employees Relations Commission's interpretation of Chapter 447. 654 So. 2d at 631 ("The Department's interest in the possible violation of section 934.03(1) related solely to discipline of a permanent career service employee.").

Chief's Rolle's failure to react to McDonough's his cell phone in plain view, Op. at 4, does not defeat any privacy expectation. In *State v. Sells*, 582 So. 2d 1244 (Fla. Dist. Ct. App. 1991), the court held:

> To permit recordings where the recorded party may be "suspicious" would completely vitiate the consent requirement. …In effect such a holding would mean that someone who violates the statute in a clumsy manner would be immune from prosecution as a matter of law. The message would be that one may intercept private communications with impunity as long as one does so in a manner that might suggest the conversation is being intercepted.

Id. at 1245. *See also Edwards*, 645 So. 2d at 589.

Finally, the public nature of the subject matter discussed (Op. at 10-11) is not determinative of the expectation of privacy. The court in *LaPorte v. State*, 512 So. 2d 984 (Fla. Dist. Ct. App. 1987), noted that, so long as the circumstances justify the expectation that the conversation will not be recorded and society recognizes the expectation to be reasonable, then a recording violates the law, regardless of the nature of the conversation, itself. *Id.* at 986. Even if the subject matter of the conversation is public in nature, if the *Inciarrano* test is otherwise met, the conversation cannot be recorded lawfully without full consent. *See also Stevenson*, 667 So. 2d at 412 (citing *LaPorte*, *supra*).

III. REHEARING EN BANC IS WARRANTED BECAUSE THE OPINION CONFLICTS WITH *MIGUT*.

In *Migut v. Flynn*, 431 Fed.Appx. 262 (11th Cir. 2005), this Court considered the qualified immunity defense of a deputy sheriff sued for arresting an individual who recorded the deputy's conversation without his consent, in violation of section 934.03. *Id.* at 263. The deputy pulled over a driver for a traffic violation, and the driver began recording the conversation. *Id.* When the deputy instructed the driver to stop recording, and he refused, the driver was arrested. *Id.* The conversation in question occurred in a public location and concerned matters of public concern (traffic enforcement).

This Court concluded there was "arguable probable cause" for the arrest. *Id.* at 266-67. Applying the *Inciarrano* two-prong test, *id.* at 265, the Court concluded:

> 1. Where both prongs of the *Inciarrano* test are met, a violation of section 934.03 occurs, whether the recorded conversation is of a private nature or not. *Id.*
>
> 2. "'Conversations occurring inside an enclosed area or in a secluded area are more likely to be protected under section 934.02(2).' *Id.* (citing *Stevenson v. State*, 667 So. 2d 410, 412 (Fla. Dist. Ct. App. 1996))
>
> 3. The unauthorized recording of a jailhouse conversation between a member of the public and police officer regarding the return of confiscated property supported "a probable belief that a violation of section 934.03(1) had occurred." *Id.* at 266.

The opinion cannot be reconciled with *Migut*. If a deputy conducting a stop along *a public right of way* enjoys an expectation of privacy and protection from

unauthorized recording, then a police chief inviting a member of the public into his own private office to discuss matters that, by state law, are confidential must also.

CONCLUSION

The Court should grant rehearing, or in the alternative, rehearing en banc to align its decision both with Florida precedents and this Court's own jurisprudence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitation set forth in Rule Fed. R. of App. P. 29(b)(4) and 11th Cir. R. 29-3 and 29-4. This brief uses Times New Roman 14-point proportionately spaced typeface and contains 2,560 words.

/s/ *Edward G. Guedes*
Edward G. Guedes

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2017, the foregoing brief was served on *pro se* Appellant, James Eric McDonough, electronically to his e-mail address, phd2b05@gmail.com, and also by U.S. mail to his address, 32320 Southwest 199th Avenue, Homestead, Florida 33030. I further certify that the foregoing brief was filed with the Clerk of Court via the CM/ECF system, causing it to be served on the following registered counsel of record:

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